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No. 91-1589

In The
Supreme Court of the United States
October Term, 1991

GEORGE SWAMP, JOHN HENDRICK, and LABOR-FARM PARTY/ PARTIDO LABORISTA-AGRARIO,

Petitioners,

vs.

KEVIN KENNEDY, individually and as Executive Director, Wisconsin State Board of Elections, PETER R. DOHR and THOMAS P. GODAR, MARK E. SOSTARICII, ROBERT L. TURNER, JOHN NIEBLER, DAVID W. OPITZ, BRENT SMITH and KIT SORENSON, individually, and as Members, Wisconsin State Board of Elections,

Respondents.

Petition For Writ Of Certiorari To The
United States Court Of Appeals For The
Seventh Circuit

BRIEF OF THE CONSERVATIVE PARTY OF NEW YORK AND THE LIBERAL PARTY OF NEW YORK AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF THE AMICI CURIAE

The Conservative Party of New York State (the "Conservative Party") and the Liberal Party of New York State (the "Liberal Party") submit this brief in support of the petition for certiorari of George Swamp, John Hendrick and Labor-Farm Party/Partido Laborista-Agrario to review the decision of the United States Court of Appeals for the Seventh Circuit in *Swamp v. Kennedy*, 950 F.2d 383 (7th Cir. 1991). The parties have consented to the filing of this brief. The amici support the petition for certiorari because the issue presented in *Swamp v. Kennedy* is of critical import to the Conservative and Liberal Parties and merits plenary review.

Petitioners in this case challenge the constitutionality of a Wisconsin law banning multiple party nominations ("MPN"), that is, the nomination of the same candidate to the same office in the same election by more than one party. Wis. Stats. §§ 8.15(7) and 8.03(a). New York has no such ban; instead, New York explicitly permits the nomination by multiple parties of the same person for the same office in the same election, so long as the parties and the candidate consent. N.Y. Elec. Law §§6-120(3), 6-146(1) (McKinney's 1978 & Supp. 1992). The Conservative and Liberal Parties have actively used MPN to nominate candidates for office who are also the nominees of another party, typically nominees of the Republican or Democratic Party. If New York were constitutionally permitted (under both the federal and state constitutions) to enact a law such as the Wisconsin statute at issue herein, and if it were to do so, the consequences for the Conservative and Liberal Parties would be grave.

MPN is one of the most effective means available for the Conservative and Liberal Parties to participate in the electoral process. If it were not available, the number of races in which the Conservative and Liberal Parties could participate effectively would be significantly reduced. Moreover, members of the Conservative and Liberal Parties would be deprived of an important vehicle for expressing their political views. Voters who can now vote for a candidate on more than one ballot line can,

through their choice of line, send to the candidate a message about which portion of his or her platform they particularly wish to support. Without MPN, they would not be able to do so. They would often be compelled to choose between "wasting" their votes on a candidate unlikely to succeed, or offering undifferentiated support to a major party candidate. Thus, both the Conservative and Liberal Parties and their members have interests that may be adversely affected by the Seventh Circuit's decision upholding a ban on MPN.

SUMMARY OF ARGUMENT

The lower court's decision fundamentally misapprehends the way in which MPN can and does work. This is no great surprise, since no state within the Seventh Circuit permits MPN. *See* Petition at 3-4, n.3. The lower court was thus forced, without any experience with MPN, to guess at the effects MPN might have on political parties and the electoral system. We submit this brief to present the experience of the Conservative and Liberal Parties with MPN in New York during the past several decades. That experience demonstrates that the Seventh Circuit's guesses as to the effects of MPN are flatly wrong. Based on these incorrect guesses, the court below has upheld a state statute that fundamentally infringes upon core First and Fourteenth Amendment rights of political parties and voters without furthering any compelling state interest.

The majority below completely ignores the fact that MPN is a crucial tool for minor and new parties to build coalitions with other parties, and thus for minor and new parties and their adherents to participate effectively in the electoral process. Contrary to the conclusion of the majority, a ban on MPN *would* restrict the right of parties to choose a standard bearer who best represents the interests of the party. It would also restrict the ability of voters to indicate their reasons for supporting a particular candidate by voting on the ballot line of a party most sympathetic to that voter's views.

The Seventh Circuit also incorrectly identifies as compelling various state interests asserted in justification of an MPN ban. None of the negative effects of MPN alleged by the court below exist in New York.

First, states have no compelling interest in ensuring that a candidate obtain office simply because he or she has won a large number of votes in one or more party's primary. General elections ensure that the winner is the choice of a majority or plurality of the voters. Although voter confusion is certainly a legitimate concern of the state, in our combined experience of over seventy years with MPN in New York, we have yet to see any evidence of voter confusion as a result of the use of MPN. In fact, our experience has been that voters appreciate greatly the choices provided by MPN.

Second, although the state has a compelling interest in preserving the integrity of the electoral process by preventing involuntary fusion, a ban on MPN is unnecessary to address this interest. As the New York experience demonstrates and the petitioners have pointed out, a simple requirement of consent by the candidates or parties (or both, as in New York) fully and effectively addresses this concern.

Finally, the concurrence below argues that a ban on MPN furthers the state's compelling interest in maintaining the distinct identity of political parties. Prior to the decision below, we are aware of no court that has held that a state has such a compelling interest. Even if the state has such a compelling interest, the experience of the Conservative and Liberal Parties in New York has been that the use of MPN has *increased* the distinct identities of political parties.

This Court should grant certiorari to review the decision of the Seventh Circuit and uphold the First and Fourteenth Amendment rights enjoyed by minor and new political parties and voters.

ARGUMENT

I. A BAN ON MULTIPLE PARTY NOMINATIONS BURDENS CORE ASSOCIATIONAL RIGHTS OF POLITICAL PARTIES AND VOTERS

The first of the errors of the majority opinion below is its assertion that a ban on MPN "does not substantially burden the 'availability of political opportunity,' because a party may nominate any candidate that the party can convince to be *its* candidate." 950 F.2d at 385 (citation omitted) (emphasis in original). That claim is completely at odds with the experience in New York.

It is difficult to imagine an act that would more substantially burden the "availability of political opportunity" for political parties in New York than a ban on MPN. MPN is a commonly employed means for political parties to form coalitions. In 1990, for example, the Conservative Party nominated a candidate who was the nominee of another party in 160 of the 202 races in which the party participated. In that year the Liberal Party used MPN to nominate its chosen standard bearer in 99 of the 116 races in which it participated.

MPN also has been an effective political strategy, with votes on the Conservative or Liberal line often providing the margin of victory for a candidate also nominated by one of the major parties. Alphonse D'Amato, for example, would not have won a Senate seat in 1980 without the votes he received on the Conservative Party line, nor would Ronald Reagan have carried New York State in the Presidential election that year without Conservative votes. (Department of State, State of New York, *Manual for the Use of the Legislature of the State of New York 1980-1981* 1137-41). Similarly, in 1990, Edward Regan, who was the Republican nominee for State Comptroller, won by fewer than the 391, 743 votes he received as the Conservative Party's nominee for the same office. (*The New York Red Book 1991-1992* 1022 [C.A. Mitchell ed. 1991]).

Votes on the Liberal Party line provided the margin of victory for John F. Kennedy in 1960 and for W. Averell Harriman when he ran for Governor in 1954. (Mazmanian, *Third Parties in Presidential Elections* 120-21 [1974]). Fiorello LaGuardia became Mayor of New York because he was the nominee of the Republican Party and the City Fusion Party (Board of Elections, City of New York, *Annual Report of the Board of Elections in the City of New York* 56-57 [1933]); and John Lindsay became Mayor of New York because he was nominated by both the Liberal and Republican Parties. (Board of Elections, City of New York, *Annual Report of the Board of Elections in the City of New York* 99 [1965]).

For the Republican Party in New York City, MPN provides a particularly critical political opportunity. Registered Democrats outnumber registered Republicans in New York City by five to one, resulting in a greater need for Republican candidates to receive multiple nominations in order to gain office.

For voters, as well as parties, the availability of political opportunity would be substantially burdened if MPN were eliminated. By voting for a candidate on the Conservative or Liberal line rather than on the line of one of the major parties, voters send a message that it is the conservative or liberal portions of the candidate's platform that they support. If MPN were banned, voters often would be forced to choose between "wasting" their votes on minor party candidates with little chance of success, and voting for a major party candidate without any opportunity to convey a message other than undifferentiated support.

II. A BAN ON MULTIPLE PARTY NOMINATIONS WOULD HURT NEW AND MINOR PARTIES MORE THAN THE MAJOR PARTIES

The second of the errors of the majority below was its conclusion that a ban on MPN does not disproportionately burden minor parties. Again, the experience in New York does not support this conclusion.

While major parties would suffer little, if at all, from a ban on MPN, such a ban would have disastrous consequences for minor and new parties. The use of MPN provides one of the best opportunities for members of minor and new parties, as well as other voters, to indicate their party preference. If two parties nominate the same candidate, a voter who supports that candidate can indicate his or her party preference as between the two nominating parties. Without MPN, a voter who supports a minor party and its candidate, but also prefers one major party candidate over the other major party candidate, will be forced to choose between supporting the minor party by voting for its candidate (who is unlikely to win, since he or she is the candidate of a minor party), and voting for the major party candidate most sympathetic to his or her views, thus indicating no support for the minor party.

A ban on MPN would also harm minor and new parties themselves. These parties would lose the votes of all voters who, as described above, are reluctant to "waste" their votes. The public indication of support for such parties, as reflected in numbers of electoral votes, would be lower than the actual support among the electorate. This undervaluation injures minor parties in two ways. First, it detracts from the prestige of the party, making it harder for the party to attract votes and to recruit new members. Second, it makes it harder for the party to attract viable candidates. If candidates were required to run on only one ballot, there is little doubt that many of those with the experience and public stature necessary to be viable candidates would hesitate to run solely on the ticket of a minor party which, by definition, has fewer resources to support its candidate than a major party. This problem is only exacerbated as

the geographic scope and cost of the campaign increase, and would be greatest at the level of the gubernatorial races. This is critical in New York, for example, since a party must win 50,000 votes in each gubernatorial election to maintain its status as a party, *see* N.Y. Elec. Law §1-104(3) (McKinney's 1978 & Supp. 1992), and its line on the ballot. *See* N.Y. Elec. Law §7-104(5) (McKinney's 1978 & Supp. 1992). The task of meeting such a requirement by running a candidate exclusively on a minor party line would require a party to devote extraordinary resources locating and supporting a viable gubernatorial candidate who is not supported by one of the major parties, resources that might be better spent in other local and state races in which such a party has a greater likelihood of success. MPN simply permits a minor party to nominate and secure the consent of otherwise viable candidates who are supported by one of the major parties, and thus in New York gives minor parties the opportunity to secure the requisite 50,000 votes without suffering from the handicap imposed by the reluctance of otherwise supportive voters to vote for candidates with little chance of success. Without the option of MPN, participation in the electoral process becomes a sisyphean task with minor parties spending enormous resources to convince their supporters to vote for candidates with little chance of success in order to retain their party's ballot status.

New minor parties in particular would be hurt by a ban on MPN. It is especially difficult to persuade those with the experience and public stature to be viable candidates to be the nominees of new parties, which have the fewest resources available to support a campaign. If new parties were forbidden to form coalitions with the major parties or other minor parties to support particular candidates, they would be stripped of one of their most powerful means of quickly making an impact on the electoral scene. The Liberal Party's first nominee, for example, was Franklin D. Roosevelt in 1944. New Yorkers cast 329,235 votes for Roosevelt on the line of the Liberal Party, which was then less then one year old. (*The New York Red Book 1945* 546 [J. Mearns ed. 1945]). Without those votes Roosevelt would have lost in New York. *Id.* The size of the vote for Roosevelt on the Liberal Party line sent a message to

Roosevelt and all of New York's political parties about the appeal of the Liberal position. By accepting the Liberal nomination, Roosevelt helped to establish quickly a new force in New York State politics that, without MPN, undoubtedly would have had a much more difficult time establishing itself.

In support of its conclusion that a ban on MPN does not discriminate against minor political parties, the majority below claims that there is no competition among parties if they choose the same candidate, and that MPN would simply permit minor parties to "leech onto" larger parties. 950 F.2d at 385. Again, the lower court has misapprehended the way MPN works. If a minor and a major party nominate the same candidate, the competition for votes has not ended. If, for example, the Republican and Conservative Parties nominate the same candidate, the Conservative Party wants that candidate to win, but also wants him or her to win with as large a share of votes on the Conservative line as possible, so that the candidate will be more likely, as an office holder, to take positions consistent with those of the Conservative Party. In addition, the Conservative Party wants as many votes on the Conservative line as possible to demonstrate the party's strength and enhance its legitimacy among the electorate. The same is true with respect to the Liberal Party and its opportunity to nominate either Democratic or Republican candidates.

The majority below is wrong in characterizing MPN as permitting minor parties to "leech onto" the larger parties. MPN permits coalitions, which benefit both the major and minor party by making more likely the election of a candidate whom both parties support. As described above, votes on the Conservative and Liberal Party lines have often provided the critical margin of victory to a candidate nominated by the Republican or Democratic Party. The degree to which parties and their candidates choose to pursue that strategy is properly left to those immediately involved. If a party wishes not to nominate a candidate who is also the nominee of another party, it can simply withhold its nomination.

III. NO COMPELLING STATE INTEREST JUSTIFIES A BAN ON MULTIPLE PARTY NOMINATIONS

The lower court has attempted to justify Wisconsin's ban on MPN based on a number of evils that allegedly would result if MPN were permitted. During our long experience with MPN, New York has been afflicted by none of those evils.

A. No Ban on Multiple Party Nominations is Necessary to Ensure That the Winner of an Election is the Choice of a Majority or a Plurality of the Voters

In support of a ban on MPN, the majority below argues that the ban is necessary to ensure that the winner of an election is the choice of a majority or a plurality of the voters. If a candidate appears on the primary ballots of more than one party but is defeated in each primary, the majority argues, the candidate's name will not be on the general ballot even though he or she may have received, in the aggregate, the majority of the votes cast in the primaries.

The state has no interest, let alone a compelling interest, in ensuring that a candidate obtain office simply becaue he or she has won a large number of votes in primaries. Our electoral system requires a candidate both to gain a place on the ballot and to win the general election. Gaining substantial support in several primaries is no substitute for winning both a primary and a general election. A primary is an intra-party event, and is not meant to reflect, and does not reflect, the decision of the general electorate concerning who should hold a particular office. That decision is properly left to a general election.

In several decades of experience with MPN in New York, we are not aware of a single instance in which the far-fetched scenario described by the lower court has occurred. Preventing an event that is so unlikely that it has not occurred in several decades of experience with MPN hardly seems a compelling state interest meriting the intrusion into party autonomy represented by a ban on MPN.

B. No Ban on Multiple Party Nominations is Necessary in Order to Avoid Voter Confusion

The majority below argues that without a ban on MPN, voters would be confused by the presence of the same candidate on the ballot of more than one party. It would, the court says, be difficult for voters to distinguish between the parties.

During the past several decades, we have never experienced such confusion or difficulty among the voters of New York. To the contrary, MPN has helped voters understand more precisely the positions of the candidates for whom they have voted. The fact that Jacob Javits typically ran for the U.S. Senate as the Liberal Party, as well as the Republican Party, nominee, made it clear to voters that Javits was a liberal Republican. Similarly, the fact that Javits' successor, Alphonse D'Amato, ran as both a Conservative Party and Republican Party nominee made it clear to voters that D'Amato was a conservative Republican. And, as noted above, voters who wished to support D'Amato because of the more conservative elements of his platform could, and did, vote for him on the Conservative Party line rather than the Republican line, while voters who wished to support Javits because of the more liberal elements of his platform could, and did, vote for him on the Liberal Party line.

C. No Ban on Multiple Party Nominations is Necessary to Preserve the Integrity of the Election Process

The final argument of the majority below in support of the ban on MPN is that it is necessary to preserve the integrity of the election process, specifically, to prevent party "raiding," or the mischievous entry into a party's primary by voters supportive of another party, and to prevent the involuntary fusion of political parties.

No ban on MPN is necessary to accomplish these goals. Multiple party nominations, which have been permitted in New York for most of this century, have not threatened in any way the integrity of the election process. Instead, they have fostered

the stability of that system by permitting voters, political parties and candidates to participate in the election process in additional ways.

Whether or not MPN is allowed will have no effect on party raiding. States can prevent party raiding by restricting who can participate in primary elections. New York, for example, restricts party primaries to enrolled party members, *see* N.Y. Elec. Law §§ 1-104(9), 5-210(5)(f) (McKinney's 1978 & Supp. 1992), and permits only members who enrolled more than twenty-five days before a primary to vote in that primary. N.Y. Elec. Law § 5-210(3) (McKinney's 1978 & Supp. 1992).

Similarly, the concern of the majority below that MPN will result in involuntary fusion can be addressed without banning MPN, simply by requiring consent to the fusion strategy by those involved. In New York, for example, involuntary fusion is simply not a problem because New York election law requires consent from both the party and the candidate before a candidate can be a party's nominee. *See* N.Y. Election Law §§ 6-120(3), 6-146(1) (McKinney's 1978 & Supp. 1992). The National Socialist Party could not, therefore, nominate a major party candidate in order to defeat that candidate, since the candidate must consent to the nomination. In addition, parties cannot involuntarily fuse in New York, because they cannot be compelled to participate in MPN. Given the simple expedient of a state law requiring consent, there is absolutely no need to ban MPN in order to meet the concerns asserted by the majority.

D. No Ban on Multiple Party Nominations is Necessary to Preserve the Distinct Identity of Political Parties

Finally, the concurring opinion below argues that a ban on MPN furthers the compelling interest of maintaining the distinct identity of political parties. Again, long experience with MPN in New York has not led to the predicted evil.

The Liberal Party has been in existence since 1944, the Conservative Party since 1962. Throughout the existence of

both parties, MPN has been permitted, and both parties have engaged in MPN on a regular basis. Nonetheless, neither party has lost its distinct identity.

Moreover, it is our view, based on our experiences in a state that permits MPN, that if a political party so mimics another that it loses its distinctiveness, that party will fare poorly in the political process. Voters, funders and those who donate their time to campaigns will not support a party that is indistinguishable from another, and candidates will not seek its nomination. In other words, the political process itself will force parties to remain sufficiently distinct from one another to attract support. There is simply no need for the state to mandate a particular quantum of difference between political parties.

Furthermore, the state has no business mandating that political parties be distinct from one another. If any party wishes to adopt a platform only slightly different from, or even identical to, that of another party, or run a slate of candidates only slightly different from, or even identical to, that of another party, the state should not be permitted to prevent it from doing so. The state surely could not scrutinize the platforms of the Republican and Democratic Parties to ensure that the two parties disagree about a sufficient number of issues.

In short, a ban on MPN is not necessary to maintain the distinctiveness of political parties. Moreover, preserving the distinctiveness of political parties is not even a legitimate state interest, let alone a compelling interest.

CONCLUSION

For the reasons contained herein, the Conservative and Liberal Parties urge this Court to grant certiorari to review the decision of the U.S. Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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